UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

STERICYCLE, INC.

and **Cases 04-CA-137660,**
04-CA-145466,
04-CA-158277 and
04-CA-160621

TEAMSTERS LOCAL 628

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Dated: December 23, 2016

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CASES

I. STATEMENT OF THE CASE

This case involves two bargaining units of employees represented by Teamsters Local 628, herein called the Union, who work in a waste treatment center in Morgantown, Pennsylvania and a transfer station facility in Southampton, Pennsylvania. Stericycle, Inc., herein Respondent, repeatedly refused to provide information relevant and necessary to the Union's performance of its representation functions at both facilities. Meanwhile, at the Morgantown facility, Respondent unilaterally imposed a team member handbook that changed numerous terms and conditions of employment including those specified in the collective bargaining agreement. Lastly, Respondent has maintained policies, both separately and in a handbook that contains numerous rules and policies that interfere with employees' Section 7 rights.

The Regional Director issued a Complaint and Notice of Hearing in Case 04-CA-137660, on January 27, 2015 (GCX-1(c)), and an Erratum on February 3, 2015 (GCX-1(g)).[1] The Acting Regional Director issued an Amended Complaint in Case 04-CA-137660, on February 4, 2015 (GCX-1(i)). Respondent filed an Answer to the Amended Complaint on February 17, 2015. (GCX-1(k)) In response to Respondent's Request for Postponement of Hearing dated March 20, 2015 (GCX-1(l)), the Regional Director issued an Order Rescheduling Hearing on March 24, 2015. (GCX-1(m)) The Regional Director issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in Cases 04-CA-137660 and 04-CA-145466 on April 3, 2015. (GCX-1(o)) Respondent filed an Answer to the Consolidated Complaint on April 15, 2015.

[1] Throughout this brief references to the transcript and exhibits will be as follows:

Transcript……	T	(followed by page number)
General Counsel's Exhibit……..	GCX	(followed by exhibit number)
Respondent's Exhibit……..	RX	(followed by exhibit number)
Charging Party's Exhibit…….	CPX	(followed by exhibit number)
Administrative Law Judge Exhibit..….	JX	(followed by exhibit number)
Administrative Law Judge Decision…	ALJD	

(GCX-1(q)) On April 20, 2015, the Acting Regional Director issued an Order Postponing Hearing Indefinitely in Cases 04-CA-137660 and 04-CA-145466. (GCX-1(r))

The Acting Regional Director issued an Order Further Consolidating Cases, Second Consolidated Complaint and Notice of Hearing in Cases 04-CA-137660, 04-CA-145466, 04-CA-158277, 04-CA-160621 and 04-CA-161145 on March 29, 2016. (GCX-1(dd)) Respondent filed an Answer to the Second Consolidated Complaint on April 12, 2015. (GCX-1(ff))

On May 10, 2016, Respondent filed a Request to General Counsel to Transfer Case to a Different Region for Reinvestigation, Reconsideration, and Further Processing as Deemed Appropriate. (GCX-1(gg)) On May 13, 2016, the Acting Regional Director issued Amendments to Second Consolidated Complaint in Cases 04-CA-137660, 04-CA-145466, 04-CA-158277, and 04-CA-160621. (GCX-1(hh)) The Charging Party filed a Response in Opposition to Respondent's Request to Transfer Case to a Different Region on May 16, 2016. (GCX-1(kk)) Counsel for General Counsel filed a Motion in Limine on May 16, 2016. (GCX-1(ll)) Respondent filed a Motion to Dismiss and Response to General Counsel's Motion in Limine on May 19, 2016. (GCX-1(mm))

As a result of the parties' discussions with Chief Administrative Law Judge Giannassi, on May 23, 2016, the Regional Director issued an Order Rescheduling Hearing. (GCX-1(nn)). On May 26, 2016, Respondent filed an Answer to Amendments to Second Consolidated Complaint. (GCX-1(pp)) Respondent filed a Motion to Dismiss Complaint to the Board on June 29, 2016. (GCX-1(qq)) The Charging Party filed a Response in Opposition to Respondent's Motion to Dismiss Complaint on August 1, 2016. (GCX-1(rr)) Counsel for General Counsel filed an Opposition to Respondent's Motion to Dismiss Complaint Without Prejudice on August 3, 2016. (GCX-1(ll)) A Referral of Motion to Dismiss Complaints to the NLRB Division of Judges was

ordered by the Board on August 19, 2016. (GCX-1(tt)) By letter dated August 23, 2016, the General Counsel denied Respondent's Motion to Transfer Case. (GCX-1(uu))

On August 24, 2016, Administrative Law Judge Michael A. Rosas issued an Order Denying Respondent's Motion to Dismiss the Complaint and Denying the General Counsel's Motion in Limine. (GCX1-(vv))

A hearing in this matter was held before Judge Rosas on August 24 and 25, 2016. At the hearing, Counsel for the General Counsel amended the Second Consolidated Complaint to eliminate paragraphs 8(b) and 11 of the Complaint. (T. 8, 28-29) Judge Rosas issued his decision in this matter on November 10, 2016. This brief is filed in support of Counsel for the General Counsel's Exceptions to the Judge's Decision.

II. STATEMENT OF FACTS

A. Background

Respondent is the largest medical waste disposal company in the United States. It picks up regulated medical waste such as bandages, bodily fluids, and sharp containers of needles, from hospitals, nursing homes, doctors' offices, dentists' offices, and veterinarian offices. (T. 34) Respondent operates a waste treatment facility that handles the collection, processing and disposal of medical waste from its Morgantown, PA facility. It also has a transfer station facility in Southampton, Pennsylvania, where drivers pick up trash which is then consolidated and brought to the Morgantown facility. (T. 35-36) The Union represents employees at both of these facilities. (T. 33, 35)

At Southampton, the Union represents a unit of approximately 105 employees, which includes drivers, driver techs, in-house techs, helpers, and dock workers. The Union was certified on September 1, 2006. (GCX-1(dd),(ff); GCX-2; T. 33, 34) The most recent collective

bargaining agreement between Respondent and the Union for Southampton unit employees was ratified on April 13, 2014 and expires on October 31, 2016. (GCX-2; T. 35, 112)

At Morgantown, the Union represents approximately 55 employees, which includes drivers, plant workers, maintenance mechanics, painters, dispatchers, and leaders. The Morgantown unit was certified on September 1, 2011. (GCX-1(dd),(ff); GCX-3; T. 36) Respondent and the Union were parties to an initial collective bargaining agreement that expired on February 29, 2016. (GCX-3; T. 37) A new collective bargaining agreement was ratified recently in June 2016. (T. 37)

A. The 401(K) Requests For Information

Article 23.3 of the 2014 Southampton collective bargaining agreement provided for the first time that Respondent was required to contribute "$0.3125 per hour paid on a pre-tax basis for all straight-time hours paid per pay period" to Respondent's 401(k) Plan or stock purchase plan for each unit employee. Essentially, for a biweekly pay period consisting of 80 straight-time hours, Respondent agreed to contribute $25 per pay period. (GCX-2, p. 13; T. 49, 50, 112) During negotiations, this was a paramount issue for the Union. (T. 49-50) The Union believed that the contract required this new benefit to be paid directly into employees' 401(k) or stock purchase plans on a pre-tax basis. Respondent believed that the contract allowed it to pay the new benefit directly to employees who would then choose whether it went into the employee's 401(k) or stock purchase plan. Only if employees elected the payment to be directed into their 401(k) plan would Respondent pay the amount on a pretax basis. If employees elected to have the payment go towards the stock purchase plan, the payment would be taxable. (RX-7, p. 42; T. 49, 275-276)

Sometime in May 2014, Respondent began paying the Southampton unit employees the $0.3125 per straight-time hour as part of employees' wages. It showed up on some employees' paystubs or earnings statements[2] as "other" and in others as "Un Sh Ex Pay." (GCX-13; T. 50, 54, 57) It did not go straight into employees 401(k) pre-tax as the Union believed it should have. Some employees were not receiving it at all. Some employees were not receiving it for all the hours they were entitled to. (T. 50, 53, 54-55)

On June 2, 2014, the Union filed a grievance alleging Respondent violated Article 23, subsection 23.3. (GCX-11; T. 51) On September 4, 2014, the Union filed for arbitration over the grievance. (RX-5) John Dagle, the Union's Secretary Treasurer, testified that although the Union was still evaluating its grievance, the Union had to file for arbitration at that time based on the time limitations in the collective bargaining agreement otherwise the grievance would have been moot. (RX-5; T. 154-155, 175-176)

On September 5, 2014, Dagle sent a letter to Willie Reiss, Southampton Facility Manager, requesting information in order for the Union to continue its investigation into and evaluation of the Article 23.3 grievance. The letter included, inter alia, requests for the following information:[3]

1. Copies of all bargaining unit employees' bi-weekly earnings statements to include all earnings, deductions and year to date totals for each for the period April 13, 2014 through September 6, 2014.

2. On an ongoing basis, beginning with the period starting September 7, 2014 provide copies of all bargaining unit employees' bi-weekly earnings statements to include all earnings, deductions and year to date totals for each subsequent biweekly pay period. (GCX-12)

[2] These terms were used interchangeably at the hearing.

[3] Exceptions were not filed over items 6 and 8 of this letter, which dealt with internal communications, meeting notes and bargaining documents, as the Administrative Law Judge properly found that Respondent unlawfully refused to provide those items in violation of Section 8(a)(5). (ALJD 32)

Dagle testified that the Union requested items 1 and 2 because the only way the Union could determine whether each individual employee was and is properly receiving the $0.3125 per straight-time hour is to look at employees' earning statements. Looking at employees' earnings statements on an ongoing basis, the Union could easily determine whether an employee was receiving the benefit, whether it was going into the 401(k), whether the benefit was taxed and whether it was paid for all the straight time hours earned by an employee. In this last regard, an employee could have more than 80 hours of straight-time during a pay period if they were paid for vacation time or other personal leave.[4] Earnings statements also indicate whether an amount is considered pre-tax or not. (GCX-13, p. 1; T. 52-53, 57, 318-319)

On September 22, 2014, Fox emailed a response to Dagle. While objecting to the Union's September 5, 2014 information request as seeking Respondent's legal theories and defenses for arbitration, Fox provided some of the information requested in the September 5, 2014 request. (GCX 15(a)(b); T. 59) With regard to item 1 of the September 5, 2014 request, Fox attached a pdf of an excel spreadsheet which purported to contain the same information that would be shown on employees' earnings statements. The pdf runs for over a 100 pages with most pages having no heading or other identifying information. (GCX-16; T. 277) Dagle testified that the document was not responsive to his request because he could not determine what information was in it. (T. 60) Fox testified that Respondent had provided the pdf report instead of the paystubs because it takes less time to generate the report than it does to print out paystubs. Fox further testified that it takes Respondent about four minutes to print out one paystub and that Southampton has about 100 employees. (T. 278) Fox admitted on cross-examination that she had specifically put the information into a pdf although in the past she had previously sent excel

[4] The paystub of Timothy O'Rourke is an example of this. Because of a payout of holiday, personal, vacation and sick time, O'Rourke's paystub shows a total of 190 hours of straight time. O'Rourke was only paid a benefit of $25, which was less than $0.3125 per straight-time hour. (T. 54-55; GCX-13, p.1)

spreadsheets to the Union.[5] She further acknowledged that the information in the report was not understandable as it was sent; nor did it show clearly the information that was on earnings statements. Fox also acknowledged that the report did not show hours worked and hours paid and year to date totals, which the paystubs would. (T. 299-301, 314-315, 316, 320-322)

With regard to item 2 of the September 5, 2014 information request, Fox responded with the following:

> The relevancy of any information requested "on an ongoing basis" is not clear. The Company also objects based on the fat that providing such records for an indefinite period of time is unduly burdensome. Please identify any specific time periods and how each is-related to the Union's investigation of this grievance or any particular grievance and the Company will re-evaluate the reasonableness of the request. (GCX-15(b))

On September 10 and 11, 2015, the parties arbitrated the grievance over this matter.[6] (T. 51, 276) In advance of the arbitration, on August 10, 2015, the Union subpoenaed Respondent for certain information, including earnings statements for each bargaining unit employee from the last pay period in each calendar quarter beginning April 2014 through the end of June 2015 and for the last pay date before September 10, 2015. (CPX-1) Pursuant to that subpoena, on September 4, 2015, Respondent's in-house attorney Dawn Blume provided a payroll report to the Union's attorney Claiborne Newlin. In her email, Blume noted that the report contains "everything found on the 'earnings statements' that you continue to reference." She further noted that Respondent has "repeatedly told the Union that it takes a payroll clerk in our department 3-4 minutes to download and print out a single earnings statement…" As an accommodation, she also stated that Respondent would provide access to Dagle to its payroll

[5] In fact, later on pursuant to an arbitration subpoena, Respondent sent similar information in an excel spreadsheet to the Union. (RX-8, pp. 6-21)
[6] The arbitration is still pending. (T. 272)

system in order to allow the Union the ability to see employee earnings statements.[7] (RX-8, p. 3) By email dated September 8, 2015, Newlin thanked her for providing "the payroll report in Excel format, which makes it a great deal easier to read than the disjointed print out provided earlier. Nevertheless, the payroll report still does not provide the year-to-date figures printed on the earnings statements." (RX-8, p. 2)

As stated above, in September 2015, Respondent, in response to the Union subpoena, provided access to the Union to its payroll system. However, the Union had issues with the access, which were unable to view the earnings statements for over two months. Finally, on November 17, 2015, Liz Sterling, Union Secretary and Office Manager, was able to see the screen with employee earnings statements. (T. 207-208) Ultimately, though she was never successful in printing out the earnings statements. (T. 163)[8]

B. The TMX Information Request

On July 9, 2015, Dagle was at the Morgantown facility when he saw that Respondent had posted a notice soliciting volunteers to participate in what they called the new workplace group "to discuss and implement the ideas we receive from the employee surveys, feedback from the meetings with the TMX team.[9]" (T. 80) The Union had not been notified. On July 15, Dagle sent a letter to District Manager Steve Pantano saying that he noticed the signup sheet and he requested the information detailed below:

> 4 Copies of all documents concerning or relating to the TMX team meetings with Morgantown employees. (GCX-28)

[7] The log-in information was provided September 8, 2015. (RX-8, p.1)
[8] Human Resource Information Systems Manager David Beaudoin's, testimony is not to the contrary. He recalled resolving Sterling's issue of not being able to see the earnings statements but could not recall if she said she could print out the earnings statements. (T. 206, 208)
[9] "TMX" stands for "Team Member Experience." (T. 81)

Dagle testified that as there were apparently meetings where terms and conditions of employment were discussed, the Union wanted any documents concerning what this TMX team was all about, the criteria, and what was going to be discussed. (T. 81)

By email on August 7, 2015, Fox responded to the Union's information request with a letter and attachments. (GCX-29(a-d); T. 81, 250-251) Fox stated:

> As you know, the sign-up sheet you saw in Morgantown was posted in error, and we have posted a notice communicating that fact to all employees. I believe you were already given a copy of the notice, but I've attached another copy for your convenience. Since there is no employee workgroup being formed in Morgantown, we feel most of the information you are requesting is irrelevant.

Nonetheless, Respondent did provide some information. With regard to item 4 specifically, Fox attached a power point presentation that was shared with the employees regarding the results of a survey, for informational purposes only. Fox went on to note that Respondent "has omitted slides that contain Company confidential information that show comparative data with our non-represented locations." (GCX-29(b)) At the hearing, Fox testified that anything that showed corporate-wide or region wide information was redacted out throughout the presentation provided to the Union. With regard, specifically to the slides that were shown to employees, one or two were removed from the slides provided to the Union for this reason because it was considered confidential despite being shown to employees. (T. 252, 296, 331) Dagle testified that the Union did not believe Respondent's response was sufficient because the survey had to do with terms and conditions of employment at Morgantown as compared to other facilities. As Dagle pointed out, the Union did not believe that the redacted information was confidential because Respondent had meetings with bargaining unit employees to go over the results of the survey and advised them how they stood as a facility compared to the overall national average. (T. 84, 86)

C. The New Handbook at Morgantown and Unlawful Overbroad Policies

In late February 2015, Respondent handed out a new handbook at the Morgantown facility to unit employees during team member experience meetings where Respondent went through the survey results. Susan O'Connor provided a list to the Union of all the employees that received the handbook during those meetings. (GCX-32; T. 89, 109, 325) In addition, as new employees have been hired they too have been given a copy of the new handbook and signed its acknowledgement. On March 2, 2015, Respondent provided a copy of the new handbook that was implemented at the Morgantown facility to the Union. (GCX-21; GCX-22; T. 71, 305-306, 328) Although implemented corporate wide, the handbook has not been distributed in Southampton. (T. 109)

It is undisputed and the Administrative Law Judge correctly found that the handbook contains different terms and conditions than the Morgantown collective bargaining agreement. (ALJD 22-23; GCX-22; (T. 91-105; 326)

The nationwide handbook given to Morgantown employees contains the following policies, in pertinent part:[10]

> **Electronic Communication Policy**—"A substantial portion of our business is transacted by telephone and over the wide area network. Therefore in order to maintain the efficiency of these systems non-business usage must be restricted. Phone and data lines must be kept open for business purposes. Accordingly, personal telephone calls and e-mails should be infrequent and brief, and limited to urgent family matters." (GCX-22, p. 26)
>
> **Use of Personal Electronics**— "The use of personal cell phones or other personal electronic devices such as MP3 players is prohibited in waste processing, warehouse, loading and unloading areas during operating hours and any areas subject to vehicle movement at any time….Personal mobile phones and all other personal mobile electronic devices are to be kept in team member's lockers. Personal phone calls and use of personal electronic devices shall be restricted to

[10] The handbook also contained a Retaliation Policy, Personal Conduct Policy, and Conflict of Interest Policy which the ALJD correctly found violated Section 8(a)(1) of the Act. (ALJD 24-27; GCX-22, pp. 10, 30, 33)

> meal and break periods. Violation of this policy may result in disciplinary action up to and including termination." (GCX-22, p. 28)

On May 21, 2015, Reiss handed Dagle two policies that he wished to negotiate with the Union about for the Southampton facility—a Camera and Video Use Policy and a Use of Personal Electronics in the Workplace Policy.[11] Reiss told Dagle that these were nationwide policies that were also in effect art Morgantown. This was the first that Dagle was aware that these policies were in effect at Morgantown. (GCX-30; GCX-31; T. 87-88)

The Use of Personal Electronics in the Workplace Policy provides, in pertinent part:

> Section 5.1 Team members, visitors and vendors are prohibited from using personal mobile phones or other personal electronic devices such as MP3 players, (i.e. iPods) in waste processing, warehouse, loading and unloading areas during operating hours, and any area subject to vehicle movement at any time.
>
> Section 5.3 Personal phone calls and use of personal electronic devices shall be restricted to meal and break periods.
>
> Section 5.5 Violation of this policy may result in disciplinary action up to and including termination.

Dagle testified that pursuant to these policies Morgantown employees are prohibited from having their cell phones in the plant, even during non-working time. Instead, they keep them in their lockers. So even on breaks or lunch, if there was a safety hazard in the plant and employees wanted to take a picture of it and forward it to him, employees are prohibited from bringing their cell phone into work areas. (T. 143, 144, 171, 241) While Dagle acknowledged that it was not good working practice to use cell phones while working, he testified that it was a good safety practice to allow employees on on-working time to take pictures of safety hazards. Dagle gave an example of an incident two years before where the shop steward was hesitant to take picture of safety hazard for fear of being fired. Dagle ended up going to the facility and made Respondent shut down the machine, which had a rusted control box that posed an electrocution risk to

[11] The ALJD correctly found that the Camera and Video Use Policy violated Section 8(a)(1) of the Act. (ALJD 28-29).

employees. Dagle also filed an OSHA complaint. OSHA eventually fined Respondent over this safety violation.[12] (T. 144-145)

III. ARGUMENT

A. The Administrative Law Judge failed to make findings of fact or conclusions of law that Respondent violated Section 8(a)(1) and (5) of the Act as alleged in paragraph 9(l) of the Second Consolidated Complaint by failing to provide earnings statements for the April 13 to September 6, 2014 pay periods to the Union because the Excel spreadsheet provided to the Union was on its face inadequate.

Under the Act, an employer is obligated, upon request, to furnish a union with information that is potentially relevant and useful to its role as the exclusive bargaining representative of unit employees. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *NLRB v Acme Industrial Co*., 385 U.S. 432, 435-436 (1967) Certain types of information pertaining to wages, hours, benefits, and working conditions of employees are considered, "so intrinsic to the core of the employer-employee relationship (as to be) considered presumptively relevant." *San Diego Guild v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977); *Coca-Cola Bottling C*o., 311 NLRB 424 (1993). Where information is considered to be presumptively relevant, no specific showing of relevance is required, and the employer has the burden of proving lack of relevance. *Marshalltown Trowel Co*., 293 NLRB 693 (1989) (the Union is not required to articulate its purpose in requesting presumptively relevant information); see also, *Ohio Power Co*., 216 NLRB 987, 991 (1975); *Grand Rapids Press*, 331 NLRB 296 (2000); *Contract Carriers Corp.*, 339 NLRB 851, 858 (2003).

An employer can avoid production only if it either proves the information is not relevant or demonstrates some reason why it cannot be provided. *Ormet Aluminum Mill Products*

[12] Although this occurred prior to the Union's knowledge of the policy, the policy has been in effect since April 2014. (GCX-31; T. 145-146)

Corporation, 335 NLRB 788, 801 (2001); *A-Plus Roofing,* 295 NLRB 967, 970 (1989), enfd. 39 F.3d 1410 (9th Cir. 1994).

On September 5, 2014, the Union requested certain information concerning Respondent's implementation of the new Article 23.3. Item 1 sought employees' earnings statements for the period April 13, 2014 through September 6, 2014 so that the Union could determine whether Respondent was properly implementing Article 23.3. As this information relates to employees' wages and benefits, it is clearly relevant. *Bryant & Stratton Business Institute,* 323 NLRB 410 (1997). Indeed, Respondent does not argue otherwise. However, Respondent did not provide the earnings statements although Respondent has done so in the past. Instead it provided some, but not all, of the information in a pdf form without headings or other identifying information. Not only was this information unusable in the way it was provided, the pdf did not even contain all the information that the Union had requested. (T. 317) Respondent's witness Carol Fox admitted at the hearing that the only way that the Union could have understood the information in the pdf was to go back and ask her specifically about the information provided. It would not be understood as it was given. (T. 301, 316) The Administrative Law Judge incorrectly dismissed this allegation on the basis that the Union did not go back to Respondent and ask for clarification. As shown by Fox's testimony, Respondent knowingly went out of its way to provide the information in ways other than how it would be useful and responsive to the Union. By doing so, Respondent did not act in good faith. Respondent was required to provide this information in a useful form and failed to do so. The failure to do so violated Section 8(a)(5). *Detroit Newspaper Agency,* 317 NLRB 1071, 1072 (1995).

In addition, contrary to the Administrative Law Judge's finding (ALJD 31(7-10)), Respondent was aware that the report was not acceptable to the Union because the Union filed a

charge almost immediately after receiving Respondent's September 22, 2014 letter. (GCX-1(a)) Moreover, when the Union requested similar information pursuant to an arbitration subpoena 11 months later, Respondent acknowledged that the Union had continued to ask for earnings statements.[13] (RX-8) Accordingly, Respondent should be found to have violated Section 8(a)(1) and (5) of the Act by failing to provide the earning statements for April 13, 2014 through September 6, 2014.

B. The Administrative Law Judge failed to make findings of fact or conclusions of law that Respondent violated Section 8(a)(1) and (5) of the Act as alleged in paragraph 9(l) of the Second Consolidated Complaint by its delay in furnishing presumptively relevant information requested in the Union's February 5, 2014 letter concerning earnings statements since September 7, 2014 onwards.

An unreasonable delay in furnishing requested relevant information is as much a violation of the Act as a refusal to provide the information at all. *Postal Service*, 332 NLRB 635, 640 (2000). The Board evaluates the reasonableness of a delay in supplying information, on the basis of "the complexity and extent of the information sought, its availability and the difficulty in retrieving the information." *Samaritan Medical Center*, 319 NLRB 392, 398 (1995). Applying this standard, the Board has found to be unlawfully unreasonable delays in providing information of six weeks, *Bundy Corp.*, 292 NLRB 671 (1989), seven weeks, *Woodland Clinic*, 331 NLRB 735, 737 (2000), six weeks, *Bituminous Roadways of Colorado*, 314 NLRB 1010 (1994), three weeks, *Aeolian Corp.*, 247 NLRB 1231, 1244 (1980), and two weeks, *Capitol Steel & Iron Co.*, 317 NLRB 809 (1995)

As described above, on September 5, 2014, the Union requested certain information concerning Respondent's implementation of the new Article 23.3. Item 2 sought employees'

[13] While Respondent also provided a report at that time, it made sure to provide it as an Excel spreadsheet with headings as opposed to an unusable pdf. (RX-8, p. 2)This was because the Respondent was actually attempting at that time to provide the information pursuant to the subpoena as opposed to what it did the year before.

earnings statements since September 7, 2014 so that the Union could on an ongoing basis determine whether Respondent was properly implementing Article 23.3. As this information relates to employees' wages and benefits, it is clearly relevant. *Bryant & Stratton Business Institute*, supra. The Administrative Law Judge correctly agreed finding that the Union was entitled to the earnings statements in relating to its grievance and the arbitration of Article 23.3. (ALJD 31(44-45) The Administrative Law Judge further found that Respondent only acquiesced to the Union's September 5, 2014 ongoing request for earning statements on September 8, 2015, over a year later when the Union subpoenaed the information prior to the parties' arbitration over Article 23.3. (ALJD 31(25-30)) Nonetheless, the Administrative Law Judge erroneously declined to find that Respondent unlawfully delayed in providing the earning statements since September 2014, because he concluded that the Union had not provided a reason why it needed the information on an ongoing basis, agreed with Respondent that providing the earnings statements was burdensome, and found that the Union did not take up Respondent's offer to reach an accommodation. (ALJD 31-32).

With regard to the Union's reason for needing the earning statements on an ongoing basis, as the information was presumptively relevant, the Union was not required to provide a rationale when requesting the information. *Marshalltown Trowel Co*., 293 NLRB at 696. In any event, the Union articulated an ongoing need for the earnings statements. Administrative Law Judge ignored Dagle's testimony as to why the Union wanted the earnings statements. Dagle testified that the Union had a due diligence to determine whether Respondent was complying with the collective bargaining agreement and that the only way to do it was track it for each employee. (T. 52-53) Dagle specifically explained that by looking at employees' earnings statements, the Union could easily determine whether an employee was receiving the benefit,

whether it was going into the 401(k), whether the benefit was taxed and whether it was paid for all the straight time hours earned by an employee. (T. 56-57) In this last regard, the record shows that there were instances where an employee could have more than 80 hours of straight-time during a pay period if they were paid for vacation time or other personal leave. (T. 318) Indeed, one of the earning statements that the Union obtained from a few employees had 190 straight hours on one earnings statement but was only paid the benefit for 80 hours, which would not be obvious unless looking at the employee's earning statement. (T. 53, 320; GCX-13) Dagle also pointed out that some employees had complained to him that they were not receiving the benefit at all. (T. 53) Thus, the record firmly established that the Union had articulated why it needed the earnings statements on an ongoing basis. In these circumstances, the Administrative Law Judge erroneously found that the Union had not provided a sufficient reason for seeking the earning statements on an ongoing basis. The Administrative Law Judge's added rationale that the collective bargaining agreement did not require the ongoing production of earnings statements is true but irrelevant. (ALJD 31(45-47)) Respondent's duty to provide the information is not a contractual obligation but one that flows from Section 8(a)(5) of the Act.

The Administrative Law Judge found that Respondent had shown that providing the earnings statements going forward as requested in Item 2 of the Union's September 5, 2014 letter was burdensome because it took Respondent four minutes to print out one earnings statement. While that may be so, Respondent has provided earnings statements in the past to the Union when requested. (T. 56; CPX-3) Furthermore, furnishing existing data has been found not to be unduly burdensome on employers. See e.g., *Taylor Forge & Pipe Works*, 113 NLRB 693, 694 (1955) (noting an information request where the employer was not required to draw up accounts or make extensive surveys but was only requested to turn over existing information was not

unduly burdensome). Moreover, as the Judge noted at the time of the original request there would have been only one earnings statement period that would have accrued at that time, which the Union was clearly entitled to and which would not have been overly burdensome. (ALJD 31(38-39)) Nonetheless, Respondent did not provide it.

Furthermore, the Administrative Law Judge's factual finding that Respondent's September 22, 2014 letter offered to reach an accommodation is not supported by the record. (ALJD 32(2-3); GCX-15(b)) Respondent's letter merely asked the Union to identify a specific time period for the request and to explain how that time period related to the Union's investigation of the grievance and then Respondent would re-evaluate the reasonableness of the Union's request. (GCX-15(b)) Respondent did not offer any accommodation. Respondent refused to provide information that was necessary and relevant to the Union's policing of the collective bargaining agreement. There was no offer of accommodation by Respondent until almost a year later, when Respondent was required to provide the information pursuant to a subpoena. Clearly, this was an unreasonable delay. *Postal Service*, 332 NLRB at 640. Accordingly, Respondent should be found to have violated Section 8(a)(5) when it unlawfully delayed providing item 2 of the September 5, 2014 information request.

C. The Administrative Law Judge failed to make findings of fact or conclusions of law that Respondent violated Section 8(a)(1) and (5) of the Act as alleged in paragraph 9(u) of the Second Consolidated Complaint by failing to provide the TMX survey results to the Union because the survey results were not confidential.

It is well settled that in certain situations, confidentiality claims may justify a refusal to provide information. *Mission Foods*, 345 NLRB 788, 791-792 (2005). When a union requests relevant but assertedly confidential information, the Board balances the union's need for the information against any "legitimate and substantial confidentiality interests established by the employer." *Detroit Edison v. NLRB*, supra 440 U.S. at 315, 318-320. The party asserting

confidentiality has the burden of proving that it has a legitimate and substantial confidentiality interest in the information sought, and that such interest outweighs its bargaining partner's need for the information. *Mission Foods*, supra; *Washington Gas Light Co.*, 273 NLRB 116 (1984). Blanket claims of confidentiality will not be upheld. *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991); *Washington Gas Light Co.*, supra at 117. When a party is unable to establish confidentiality, no balancing of interests is required and it must disclose the information in full to the requesting party. *Detroit Newspaper Agency*, 317 NLRB at 1072; *Lasher Service Corp.*, 332 NLRB 834, 834 (2000). See generally *Bud Antle*, 361 NLRB No. 87 (2014), incorporating by reference 359 NLRB 1257, 1265 (2013) (union grieving subcontracting of unit work entitled to requested information on contracts, production, and locations where work performed, etc., where employer failed to substantiate claim that information was trade secret and proprietary). Finally, even if such conditions are satisfied, the party may not simply refuse to provide the requested information, but must instead seek an accommodation that would allow the requesting party an opportunity to obtain the information it needs while protecting the party's interest in confidentiality. *Mission Foods*, supra 345 NLRB at 791-792; *Tritac Corp.*, 286 NLRB 522, 522 (1987).

On July 15, 2015, the Union requested copies of all documents concerning or relating to the TMX meetings with Morgantown employees. On August 7, Respondent provided a power point presentation that was shared with employees regarding the result of TMX survey. Respondent, however, omitted several slides that it asserted contained confidential information because it showed comparative data with non-represented locations. The Administrative Law Judge erroneously found that the Union was not entitled to the information and dismissed this allegation because the information requested related to non-unit employees, was not

presumptively relevant and the Union had not made a showing that the information contained in the surveys of employees at other Respondent facilities "had any bearing on the actual terms and conditions of the Morgantown facility's unit employees." (ALJD 36(10-16))

The Administrative Law Judge incorrectly found that the Union had not established the relevance of the information requested. The Board uses a broad, discovery-type standard in determining the relevance of requested information. Potential or probable relevance is sufficient to give rise to an employer's obligation to provide information. *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994). Respondent's survey compared the satisfaction of Morgantown unit employees with their terms and conditions of employment with those of Respondent's employees nationwide. Respondent then made a point of meeting with and discussing the results, which clearly had to do with the terms and conditions of employment, with Morgantown employees. The issue of parity with other employees was thus brought up by Respondent. In these circumstances, the Union has established the potential relevance of the information requested sufficient to give rise to Respondent's obligation to provide the information. See e.g. *Brazos Elec. Power Coop.*, 241 NLRB 1016 (1979), enfd., 615 F.2d 1100 (5th Cir. 1980).

Furthermore, Respondent's contention that this information is confidential lacks merit. Respondent showed it to the Morgantown unit employees. Thus, it clearly could not be considered so confidential as to preclude it from providing it to the Union. Respondent has failed to demonstrate a legitimate and substantial confidentiality interest in the TMX survey presentation. Moreover, Respondent never proposed an accommodation that would have satisfied its' supposed confidentiality concerns. *Stella D'oro Biscuit Company, Inc.*, 355 NLRB 769, 774

(2010). Accordingly, Respondent should be found to have violated Section 8(a)(5) by failing and refusing to provide the information requested in the Union's July 2, 2015 information request.

D. The Administrative Law Judge failed to make findings of fact or conclusions of law that Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 6(a)(i) of the Second Consolidated Complaint and erred in concluding that Respondent's Personal Electronics Policy was not overly broad because Respondent failed to narrowly tailor its policy to address safety concerns or establish a substantial business justification.

A rule that does not explicitly restrict Section 7 activity is nonetheless unlawful if employees would reasonably construe the language to prohibit such conduct. *Palms Hotel and Casino*, 344 NLRB 1363, 1367 (2005); *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). It is well-established that any ambiguity in the rule must be construed against the employer who promulgated and drafted it. *Karl Knauz Motors, Inc.*, 358 NLRB 1754, 1755 (2012); *Palms Hotel and Casino*, 344 NLRB at 1368; *Norris I O'Bannon*, 307 NLRB 1236, 1245 (1992). Moreover, for a rule to be unlawful, it is not necessary to show that the overly broad interpretation is the only reasonable one. See *Double D Construction Group, Inc.*, 339 NLRB 303, 303-304 (2003); *Jordan Marsh Stores Corp.*, 317 NLRB 460, 463 (1995) ("Employees need not be lawyers, parsing every phrase to seek out permissible constructions.")

Respondent's Use of Personal Electronics in the Workplace policy, which appears nearly verbatim in both the employee handbook and the policy manual, is unlawfully overbroad. The rule requires employees to keep their phones in their lockers during work time and it prohibits them from entering work areas with their phones. As a result, an employee could reasonably interpret the rule to prohibit employees from taking pictures of safety violations while on non-working time.

In concluding that the rule was lawful, the Administrative Law Judge first explained that since the instant rule does not specifically mention picture-taking or recording activities, which are instead addressed by a separate rule regarding cameras – the Camera and Video Use Policy – the rule could be reasonably understood to prohibit employees from engaging in telephone conversations, listening to music, or reading while in work areas. (ALJD 24(8-15) While this interpretation of the rule may be reasonable, it is not the only reasonable interpretation. Nothing in Respondent's Camera and Video Use Policy, which the Administrative Law Judge correctly found to be unlawful[14], would preclude an employee from reasonably interpreting the Use of Personal Electronic policy to infringe on Section 7 activity, like photographing on non-working time a potential safety hazard. *Double D Construction Group, Inc.*, supra; *Jordan Marsh Stores Corp.*, supra. While Judge Rosas correctly noted in his decision that many but not all personal electronic devices possess photographic and recording capabilities, the prevalence of cell phones with such functions, to the extent it has any substantial bearing on determining the reasonableness of an interpretation, would increase rather than decrease the likelihood that an employee would reasonably view this rule to cover photographing and recording with cell phones during non-working time. At the very least, these competing interpretations demonstrate the rule's ambiguity, and should be resolved against the Respondent.

The Administrative Law Judge also relied in support of his ruling on the fact that employees must wear protective gear, including gloves. (ALJD 24(21-25) The Administrative Law Judge incorrectly assumed that even when employees were not on working time they would be required to wear protective equipment such as gloves on the floor. The record does not contain any evidence of a clear rule or practice prohibiting employees from being out on the floor during non-working time without protective equipment. The handbook only provides that

[14] (ALJD 28-29)

employees may need "to wear personal protective equipment when performing certain job duties." (GCX-22, pg. 39)

Lastly, the Administrative Law Judge concluded that any impact of the rule on Section 7 activity is outweighed by Respondent's substantial business justification. While there is no dispute that operating a personal device while working would present a substantial safety risk, there is no evidence that operating a device inside the plant during non-work time presents such a safety risk. As Dagle testified, he personally observed management using their cell phone inside the plant. (T. 143)

Therefore, the Administrative Law Judge's rationale for upholding the Use of Personal Electronics policy is based upon a narrow construction that improperly excludes other reasonable interpretations and safety concerns during non-work time that were not supported in the record. Respondent's Use of Personal Electronics policy is overly broad since it could be reasonably interpreted to preclude an employee from using a cell phone during non-working time to record a potential safety hazard in work areas, and Respondent did not establish a substantial business justification that outweighs the rule's impact on Section 7 rights. Accordingly, Respondent's Use of Personal Electronics Policy should be found to have violated Section 8(a)(1) of the Act.

E. The Administrative Law Judge failed to make findings of fact or conclusions of law that Respondent violated Section 8(a)(1) of the Act as alleged in paragraphs 6(a)(v), 6(c) and 6(d) of the Second Consolidated Complaint regarding Respondent's unlawful Electronic Communications Policy because the policy applies to employees nationwide who have access to Respondent's email system.

After finding that the Respondent's Electronic Communication Policy is overly broad because it limits the use of its email system to "urgent family matters" and that the Respondent did not establish special circumstances justifying its non-business use restriction, the Administrative Law Judge ultimately dismissed the relevant allegations contained in paragraph

6(a)(v) of the Second Consolidated Complaint. (ALJD 28(10-18)) The Administrative Law Judge reasoned that the allegations warranted dismissal because the record did not contain evidence that the unit employees had access to the Respondent's email system at any time. In support, he compared the instant matter to *Purple Communications*, 361 NLRB No. 126, slip op. at 14 (2014) where the employees were subject to an overly broad policy restricting email access, received assigned email addresses, and they regularly used the employers' computers to perform their work.

The Administrative Law Judge's conclusion is inconsistent with his findings. Judge Rosas found that the employee handbook, which contains the Electronic Communication Policy, is a nationwide handbook. Therefore, its provisions apply to both unit and non-unit employees at Respondent's facilities' across the nation. Respondent's policy expressly states that its email system is provided to employees for business use.

The Administrative Law Judge also misapplied *Purple Communications*. Under *Purple Communications*, the Board adopted a presumption that employees who are provided work access to an employer's email system have a presumptive right to use the employer's system during non-working time to engage in union and protected concerted activity. As discussed above, the record reflects that Respondent's employees have access to its email system. Thus, its employees have a presumptive right to use the employer's system to engage in Section 7 activity absent special circumstances justifying its non-business use. The Administrative Law Judge found that Respondent did not rebut the presumption. Thus, the analysis under *Purple Communications* is complete, as Respondent failed to rebut the presumption that its policy interfered with employees' right to use the email system during non-working time. The lawfulness of the Electronic Communications policy is not dependent on an additional showing

that a particular subset of Respondent's employees used the email system.[15] Accordingly, Respondent's Electronic Communications Policy should be found to have violated Section 8(a)(1) of the Act.

F. The Administrative Law Judge's order inadvertently omitted the remedy of rescission for Respondent's facilities nationwide, although it was set forth in the nationwide notice posting.

To remedy the unlawful policies maintained at all of Respondent's facilities nationwide, the Administrative Law Judge properly determined that the General Counsel's request for a nationwide posting was appropriate. (ALJD 38(22-27)) The nationwide posting, which is set forth in Appendix B of the decision, specifically provides the following statement:

> WE WILL furnish all employees at our facilities nationwide with (1) inserts for the current employee handbook that advise that the unlawful rules have been rescinded, or (2) the language of lawful rules on adhesive backing that will cover or correct the unlawful rules, or (3) publish and distribute revised handbooks that do not contain the unlawful rules.

However, the Administrative Law Judge's order inadvertently omits this rescission remedy from the Order. (ALJD 38-41) Accordingly, the order should be revised to conform with the notice and include the above remedy for Respondent's facilities nationwide.

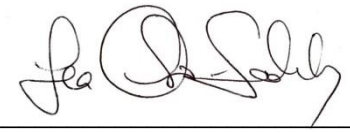
IV. CONCLUSION

For the reasons set forth above, Counsel for the General Counsel respectfully urges the

[15] Although not expressly cited by the Administrative Law Judge, Respondent in its post-hearing brief, relied upon *Shamrock Foods Co.*,2016 WL 555903, Case No. 28-CA-150157 (2016, ALJ Jeffrey D. Wedekind) to support the view that *Purple Communications* requires such a particularized showing. However, the administrative law judge's ruling in *Shamrock* to dismiss a handbook policy restricting employee's access to the company email system is factually distinguishable because a former human resources representative testified that employees did not have access to the employer's email system and that testimony was not rebutted at trial.

Board to find that the Administrative Law Judge: (1) erred in failing to find that Respondent violated Section 8(a)(1) and (5) by refusing to provide earnings statements and the redacted portions of the TMX survey to the Union; (2) erred in failing to find that Respondent violated Section 8(a)(1) by maintaining the Use of Personal Electronics in the Workplace Policy and Electronic Communications Policy; and (3) inadvertently omitted a remedy from the Order.

Respectfully submitted,



Dated: December 23, 2016

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[16] Christina Gubitosa's name was also inadvertently left off the Administrative Law Judge's Decision as Co-counsel for the General Counsel.